

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHAWN DAY,

Plaintiff,

v.

COUNTY OF CONTRA COSTA, et al.,

Defendants.

No. C 07-4335 PJH

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Defendants' motion for summary judgment came on for hearing before this court on September 10, 2008. Plaintiff appeared by his counsel Thom Seaton and Larry E. Cook, and defendants appeared by their counsel Noah G. Blechman and James V. Fitzgerald III. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion.

BACKGROUND

Plaintiff Shawn Day filed this wrongful death and police excessive force case on his own behalf and as the successor in interest to the Estate of Steffan Matthew Day ("decedent" or "Steffen Day" or "Day"). Defendants are the County of Contra Costa; Warren Rupf, the Sheriff of Contra Costa County; and Joshua Patzer, a Deputy Sheriff employed by Contra Costa County.

On August 15, 2006, Steffen Day, who was 17 years old, was driving a Ford Mustang with two passengers in the Bay Point area of Contra Costa County. Deputy Sheriff Jason Vorhauer was driving a marked Sheriff's patrol vehicle in which Deputy Patzer was a passenger. Both deputies were in full uniform.

1 At approximately 1:45 a.m., the two deputies spotted the Mustang and a pickup
2 truck that was tailgating the Mustang. Both vehicles were being driving erratically. Deputy
3 Vorhauer drove the patrol car behind the two vehicles so that the deputies could observe
4 more closely. The two vehicles continued to move erratically. Deputy Patzer attempted to
5 run the license plate of the pickup truck, but was unable to see the rear license plate
6 because of the position of the bumper. As the patrol car approached the truck, the driver
7 began to drive lawfully. However, the driver of the Mustang continued to drive erratically
8 and also sped up and made a right-hand turn. Officer Vorhauer followed the Mustang.

9 The Mustang and the patrol car made two turns, and the Mustang came to a
10 temporary stop. Both deputies noticed that the trunk of the Mustang did not have a lock.
11 They believed that this was indicative of a lock that had been “punched,” a common
12 technique used by car thieves. Deputy Patzer attempted to run the license plate, to
13 determine whether the Mustang was stolen. After the brief stop, the driver of the Mustang
14 took off again.

15 Before Deputy Patzer was able to confirm whether the Mustang was stolen, the
16 driver pulled into the driveway of a house located at 36 Galleon Way in Pittsburg. Both
17 deputies activated their side spotlights in order to illuminate the area. Both deputies
18 noticed “furtive movements” by the Mustang’s three occupants. They also noticed that the
19 two front passengers appeared to be handing items to the passenger in the back seat.

20 Both deputies exited the patrol car and approached the Mustang – Deputy Patzer on
21 the passenger side, and Deputy Vorhauer on the driver’s side – both carrying flashlights.
22 Deputy Patzer looked into the Mustang and saw that there was no key in the ignition on the
23 steering column (although the engine was idling), which further suggested that the Mustang
24 was stolen. From his perspective, Deputy Vorhauer noticed glass on the floorboard on the
25 driver’s side, and a “center punch” tool in the center console area. Deputy Vorhauer knew
26 that there is typically broken glass in a stolen vehicle, because of the forced entry, and that
27 a “center punch” tool is a metal object often used to break windows.

28 Deputy Patzer informed Deputy Vorhauer that there was no key in the ignition.

1 Deputy Vorhauer told the driver, Steffen Day, to turn off the ignition, but Day stated that he
2 was unable to do so. Deputy Vorhauer interpreted this as additional evidence that the
3 vehicle had been stolen. At about the same time, Deputy Patzer pulled out his weapon,
4 and held it in the "low ready" position behind his leg, as he was fearful for his safety at that
5 point and believed the Mustang had been stolen. One of the vehicle's occupants attempted
6 to open the passenger door, but Deputy Patzer pushed the door shut.

7 Deputy Patzer ordered the front passenger to place his hands on the dashboard,
8 and the back passenger to place his hands on the headrest. The occupants of the
9 Mustang did not immediately comply with the request to keep their hands in plain sight, but
10 eventually did.

11 During this time, Deputy Vorhauer was attempting to get the driver, Steffen Day, to
12 exit the Mustang. Deputy Vorhauer states that it was his normal practice in such situations
13 to "trap" the driver between the car and the door. In this case, however, because Day
14 could not turn the Mustang's ignition off, and because Deputy Vorhauer did not want Day to
15 get back in the car and take off, potentially putting the two deputies at risk of injury or
16 death, he asked Day to step around the door towards the front left panel of the Mustang.
17 Deputy Vorhauer's intent was to get Day away from the vehicle and pat search him for
18 weapons. Day then stepped around the door and Officer Vorhauer followed him towards
19 the front of the Mustang.

20 Deputy Patzer was still attempting to get the two passengers to keep their hands in
21 plain sight. He noticed that the rear passenger had dropped his hands from the headrest,
22 and they were no longer in sight. Deputy Patzer believed this to be an officer safety issue,
23 as he did not know whether there were any weapons in the vehicle, and could no longer
24 see the rear passenger's hands. He again told the passenger to place his hands on the
25 headrest.

26 Meanwhile, as Day got to the front left panel of the vehicle, he started running
27 around the front of the vehicle towards and past Deputy Patzer, between the Mustang and
28 the garage door. Deputy Patzer saw Day running, looked back at the Mustang, and saw

1 that the front passenger was again attempting to open the door. Deputy Patzer used his
2 foot to kick the door closed. He then put his weapon back in the holster, and gave chase
3 after Day, as he was now closer to Day than Deputy Vorhauer was.

4 Deputy Patzer yelled, "Foot pursuit," indicating to Deputy Vorhauer that he was
5 proceeding in pursuit of Day. Deputy Patzer believed that Deputy Vorhauer had not yet
6 conducted a pat search of Day, and so did not know whether Day was carrying any
7 weapons. Deputy Vorhauer remained with the other two passengers in the Mustang. He
8 did not know whether they had any weapons.

9 Deputy Patzer saw Day jump the wall between the house at 36 Galleon Way and the
10 adjacent house at 30 Galleon Way, and saw him fall after the jump. Deputy Patzer then
11 jumped up on top of the wall, watched Day run off, and jumped down. He pulled out his
12 flashlight, as the area in which he had landed was very dark.

13 Deputy Patzer chased Day through some bushes along the side of the 30 Galleon
14 Way property. He shined the light toward Day, and saw that he was attempting to get into
15 the front door of the residence. Deputy Patzer did not know whether Day knew the
16 occupants of the house, or whether he was just continuing his attempt to flee. He
17 continued to chase Day back out onto the street, as Day moved toward the next house
18 down the street, 26 Galleon Way.

19 Officer Patzer yelled, "Stop! Sheriff's Office! Police! Stop!" – or words to that effect
20 – several times, but Day continued to flee. As Officer Patzer chased Day toward the next
21 house, Day ran toward the front door of that residence, but suddenly turned toward the
22 right and jumped on the nearby fence. As Day jumped on the fence, Deputy Patzer caught
23 up with him and grabbed his shoulders to pull him back down so he could control and
24 handcuff him. However, the fence was actually a gate, which gave way and opened. This
25 caused Deputy Patzer to fall forward to the ground onto his knees and to drop his flashlight.
26 At that point, there was no light in the yard area.

27 Deputy Patzer and Day were in a narrow side yard, next to a house. The yard
28 contained substantial amounts of trash and debris. As Deputy Patzer was attempting to

1 stand up, he was hit hard on the left side of his head/face. This caused him to stumble
2 backward, and dazed him somewhat. He was having difficulty seeing, as the yard area
3 was very dark. He could not locate his flashlight, which was partially buried under the
4 debris.

5 Deputy Patzer believes it was Day that hit him, stating in his declaration, "As I was
6 attempting to stand back up and to locate my flashlight, I was hit in the face by Day, it felt
7 like a fist punch to the left side of my head, which caused me to stumble backwards and
8 dazed me." However, plaintiff speculates that as Deputy Patzer was rising to his feet, he
9 hit his head on a square air conditioner unit that was sticking out from a window,
10 approximately three feet in from the gate the two men had fallen through.

11 Deputy Patzer moved forward to grab Day to prevent him from running, but instead
12 of grabbing Day from behind, as he had anticipated, he made contact with Day's shoulders
13 because Day was facing him. Day continued to punch and take swings at Deputy Patzer,
14 who ducked his head between his arms to avoid being hit in the face or head. Day also
15 started to push Deputy Patzer backwards. Some of Day's blows were making contact with
16 Deputy Patzer's head and shoulders. Deputy Patzer then pushed Day away, hoping that
17 this would stop the assault.

18 Because of all the debris in the yard, Deputy Patzer was slipping around and having
19 trouble gaining solid leverage. As Deputy Patzer regained his balance, Day once again
20 moved on top of him, causing Deputy Patzer to fall down in a pile of debris and trash. It
21 was so dark in the side yard that Deputy Patzer could see only Day's silhouette, and could
22 not see his hands or whether he had a weapon in his hands or in his waistband. As Deputy
23 Patzer fell down again, his right arm went through a pile of trash and he held his left arm up
24 to try to protect himself from Day, who was on top of him and was aggressively swinging at
25 him.

26 Deputy Patzer used his legs to push off the ground and get up again. He expected
27 Day to run away at that point, and states that "that was okay with me," as he was still dazed
28 from the original blow to the head, and Day had been on top of him twice, and had been

1 overpowering him. Deputy Patzer was willing to let Day run away if that would stop the
2 violent assault. Instead of fleeing, however, Day came back again at Deputy Patzer,
3 swinging in an aggressive manner. Deputy Patzer put his left hand up to protect himself,
4 and put his other hand on his duty weapon.

5 As Day was pushing him backwards, Deputy Patzer felt something hit him from
6 behind, in the middle of his back. He feared that this might be an ambush from either the
7 other passengers in the Mustang, or friends of Day from a nearby house. Day continued
8 pushing Deputy Patzer backward, punching and hitting him. Deputy Patzer believed his life
9 was in danger because he was convinced that Day was going to get on top of him again.
10 He grabbed his weapon, and tried to step back and bend down a little bit.

11 Deputy Patzer fired one shot in the direction of Day with his arm bent backwards,
12 close to his body and away from Day, in what he states is known in the law enforcement
13 field as the "retention position." According to Deputy Patzer, this position is used by
14 officers in situations when they are being assaulted, and/or to prevent a suspect from
15 grabbing an officer's weapon. Deputy Patzer did not have a taser with him at the time, and
16 states that he could not have used a baton or pepper spray because he was so close to
17 Day, because he could not see clearly, and because Day was being so aggressive in his
18 attacks. When Deputy Vorhauer, who was still back at the Mustang guarding the
19 passengers, heard the gunshot, he pulled out his firearm and pointed it at the two
20 passengers.

21 Immediately after Deputy Patzer fired his weapon, the force exerted on him by Day
22 stopped. However, the force of the gunshot also made Deputy Patzer's foot slip out on the
23 ground so that he had again to regain his balance. At first, he believed that Day had run
24 off. He then saw his flashlight lying on the ground under some debris to his left. He kicked
25 the debris aside and picked up the flashlight and shined it behind him to see who or what
26 had slammed into him. He saw a square external air conditioner unit hanging out of the
27 window of the house. He later concluded that it had been the air conditioner that had hit
28 him in the back as Day had been forcing him backwards.

1 Deputy Patzer shined the flashlight in front of him and noticed Day lying on the
2 ground, attempting to get up. He yelled, "Sheriff's Office! Stay on the ground! Don't get
3 up!" – or words to that effect. He had both his weapon and flashlight pointed at Day at this
4 point. He was feeling physically exhausted because of the struggle with Day.

5 When Deputy Patzer noticed that Day was bleeding, he got on his radio and asked
6 for a "Code 3 cover," which is a request for officers to come to the scene urgently with
7 lights and sirens to assist. He also asked dispatch to send fire and ambulance for Day. He
8 informed dispatch that shots had been fired and that the suspect was down, and gave them
9 the number of the house. Officer Vorhauer, who was waiting to hear what was going on
10 from Deputy Patzer, heard the call to dispatch.

11 At that point, Deputy Patzer did not know what Deputy Vorhauer was doing with the
12 two passengers, or whether the passengers were armed, or possibly fighting with Officer
13 Vorhauer, or attempting to flee. After Deputy Vorhauer heard Deputy Patzer place the call
14 to dispatch, he handcuffed the passengers and went to find Deputy Patzer to ask what had
15 happened. Deputy Patzer told Deputy Vorhauer that Day had been on top of him and had
16 been hitting him. Deputy Vorhauer could see a large fresh bump or knot on the left side of
17 Deputy Patzer's forehead.

18 Other officers arrived soon thereafter, and both Deputy Patzer and Deputy Vorhauer
19 were sequestered and placed in a Sheriff's Office patrol car while the other officers took
20 control of the scene. Before Deputy Patzer was sequestered, he assisted in moving some
21 of the trash and debris away so the gate could be fully opened and to create a path for
22 medical personnel and other officers. Deputy Patzer concluded that the side yard gate was
23 not meant to be opened, as it was apparent that the trash and debris had accumulated
24 behind the gate for a long period.

25 Deputy Vorhauer estimated that the entire incident from the time that the deputies
26 stopped their patrol car until Officer Patzer shot Day lasted less than two minutes, and also
27 estimated that it was 30-40 seconds from the time that Day ran away that he heard the
28 single gunshot. Deputy Patzer estimated that the time from when Day started struggling

1 with him in the side yard after they had gone over the fence, until the time that he fired his
2 weapon at Day, was about 15-20 seconds.

3 Day was taken to the hospital in an ambulance, where he was pronounced dead at
4 2:55 a.m. Dr. Brian Peterson, a forensic pathologist, performed an autopsy several hours
5 later. The cause of death was internal bleeding because of the gunshot wound. The bullet
6 came in through the front of decedent's body, went through his abdominal wall and severed
7 a key artery, and then lodged in his pelvis. At the time of his death, decedent was
8 approximately 5'11" and weighed 178.5 pounds. On the date of the incident, Deputy Patzer
9 was 5'11" and weighed between 180 and 190 pounds.

10 Dr. Peterson found fresh scratches on the back of decedent's right hand, which were
11 consistent with being in a struggle and punching. He also found a fresh brush-type
12 abrasion in the middle of decedent's forehead, and a fresh abrasion on decedent's chest
13 that matched a pattern of contact with a fence.

14 Per Dr. Peterson's request, decedent's bodily fluids were tested for toxicological
15 results. A significant amount (0.55 micrograms per ml.) of methamphetamine was detected
16 in decedent's system at the time of his death. According to Dr. Peterson, it is generally
17 accepted in the medical community that a methamphetamine level greater than 0.55 is
18 deemed a "lethal" level, and decedent's level was above that. Dr. Peterson believed that it
19 was likely that decedent had a higher level of methamphetamine in his system at the time
20 of the shooting, and that the level had been diluted during the introduction of intravenous
21 fluids for the emergency medical treatment.

22 Decedent also had an amphetamine level of 0.04 micrograms per ml., which,
23 according to Dr. Peterson, means that only a small amount of the ingested
24 methamphetamine had actually been metabolized. This indicated, according to Dr.
25 Peterson, that decedent had used methamphetamine shortly before his death. Overall, Dr.
26 Peterson concluded, decedent had used a large dose of methamphetamine shortly before
27 his death.

28 Following the incident, Sheriff Rupf investigated, and determined that Deputy

1 Patzer's use of force was not improper, and declined to take disciplinary action.

2 Plaintiff filed this action on August 22, 2007, asserting five causes of action:

3 (1) violation of decedent's Fourth Amendment right to be free from excessive force, alleged
4 against Deputy Patzer; (2) violation of plaintiff's Fourteenth Amendment right to maintain a
5 parental relationship with decedent, alleged against Deputy Patzer; (3) violation of plaintiff's
6 and decedent's rights under the Fourth Amendment, alleged against Sheriff Rupf, for failure
7 to train and supervise Deputy Patzer with regard to the appropriate use of force; (4)
8 wrongful death, against all defendants; and (5) violation of decedent's civil rights, alleged
9 under California Civil Code § 52.1, against Deputy Patzer and the County.

10 DISCUSSION

11 A. Legal Standard

12 Summary judgment is appropriate when there is no genuine issue as to material
13 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
14 Material facts are those that might affect the outcome of the case. Anderson v. Liberty
15 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there
16 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

17 A party seeking summary judgment bears the initial burden of informing the court of
18 the basis for its motion, and of identifying those portions of the pleadings and discovery
19 responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp.
20 v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof
21 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other
22 than for the moving party. Southern Calif. Gas. Co. v. City of Santa Ana, 336 F.3d 885,
23 888 (9th Cir. 2003).

24 On an issue where the nonmoving party will bear the burden of proof at trial, the
25 moving party can prevail merely by pointing out to the district court that there is an absence
26 of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-25. If the
27 moving party meets its initial burden, the opposing party must then set forth specific facts
28 showing that there is some genuine issue for trial in order to defeat the motion. See Fed.

1 R. Civ. P. 56(e); Anderson, 477 U.S. at 250.

2 “A scintilla of evidence or evidence that is merely colorable or not significantly
3 probative does not present a genuine issue of material fact” precluding summary judgment.
4 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000); see also Summers v.
5 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997). On summary judgment the court
6 is not to weigh the evidence or determine the truth of the matters asserted but must only
7 determine whether there is a genuine issue of material fact that must be resolved by trial.
8 See Summers, 127 F.3d at 1152. Nonetheless, in order for any factual dispute to be
9 genuine, there must be enough doubt for a reasonable trier of fact to find for the plaintiff in
10 order to defeat a defendant's summary judgment motion. Addisu, 198 F.3d at 1134.

11 B. Defendants' Motion for Summary Judgment

12 Defendants make four arguments in support of their motion. First, they assert that
13 Deputy Patzer is entitled to qualified immunity. Second, they contend that Deputy Patzer's
14 use of deadly force did not violate plaintiff's Fourteenth Amendment right to maintain a
15 parental relationship. Third, they argue that the claims against Contra Costa County must
16 be dismissed because plaintiff cannot establish municipal liability. Fourth, they contend
17 that plaintiff's state law claims fail because Deputy Patzer acted in accordance with the
18 Fourth Amendment; and because Deputy Patzer and the County are entitled to immunity
19 under the California Government Code.

20 1. Whether Deputy Patzer is entitled to qualified immunity

21 Defendants argue that Deputy Patzer is entitled to qualified immunity. The defense
22 of qualified immunity protects “government officials . . . from liability for civil damages
23 insofar as their conduct does not violate clearly established statutory or constitutional rights
24 of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818
25 (1982). Qualified immunity involves a two-part inquiry. Saucier v. Katz, 533 U.S. 194, 201-
26 02 (2001). The initial question is whether the facts, taken in the light most favorable to the
27 party asserting the injury, show that the officer's conduct violated a constitutional right. Id.
28 at 201.

1 Thus, when qualified immunity is asserted in a motion for summary judgment, the
2 first step in the analysis is to consider the materials submitted in support of and in
3 opposition to the motion, “in order to decide whether a constitutional right would be violated
4 if all facts are viewed in favor of the party opposing summary judgment.” Jeffers v. Gomez,
5 267 F.3d 895, 909 (9th Cir. 2001). The issue is not whether a claim is stated for a violation
6 of plaintiff's constitutional rights, but rather whether the defendants actually violated a
7 constitutional right. Martin v. City of Oceanside, 360 F.3d 1078, 1082 (9th Cir. 2004).

8 In the excessive force context, this means that the court must inquire into the
9 objective reasonableness of the officer's belief in the necessity of his actions. Wilkins v.
10 City of Oakland, 350 F.3d 949, 954-55 (9th Cir. 2003). Although “reasonableness
11 traditionally is a question of fact for the jury,” a defendant can prevail on summary judgment
12 if the court “concludes, after resolving all factual disputes in favor of the plaintiff, that the
13 officer's use of force was objectively reasonable under the circumstances.” Scott v.
14 Henrich, 39 F.3d 912, 915 (9th Cir. 1994).

15 If no constitutional right would have been violated were the allegations established,
16 there is no necessity for further inquiries concerning qualified immunity. Saucier, 533 U.S.
17 at 201. If, on the other hand, a violation could be made out on a favorable view of the
18 parties' submissions, the next step for the court is to determine whether the right was
19 clearly established – that is, whether it would be clear to a reasonable officer that his
20 conduct was unlawful in the situation he confronted. Id. If the law did not put the officer on
21 notice that his conduct would be clearly unlawful, summary judgment based on qualified
22 immunity is appropriate. Id.

23 “The question is what the officer reasonably understood his powers and
24 responsibilities to be, when he acted under clearly established standards.” Id. at 208. In
25 the excessive force context, this step involves an inquiry into the objective reasonableness
26 of the officer's belief in the legality of his actions. Wilkins, 350 F.3d at 954-55. “If the law
27 did not put the officer on notice that his conduct would be clearly unlawful, summary
28 judgment based on qualified immunity is appropriate.” Saucier, 533 U.S. at 202.

1 If the officer was mistaken as to what the law requires, but that mistake was
2 reasonable, the officer is still entitled to the immunity defense. Id. at 205. In other words,
3 “[q]ualified immunity shields an officer from suit when [he] makes a decision that, even if
4 constitutionally deficient, reasonably misapprehends the law governing the circumstances
5 [he] confronted.” Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (citing Saucier, 533 U.S.
6 at 206).

7 All claims of excessive force are analyzed under the “objective reasonableness”
8 standard of the Fourth Amendment set forth in Tennessee v. Garner, 471 U.S. 1 (1985)
9 and Graham v. Connor, 490 U.S. 386 (1989). See Blanford v. Sacramento County, 406
10 F.3d 1110, 1115 (9th Cir. 2005).

11 In Garner, the Supreme Court for the first time considered the constitutionality of the
12 common law rule permitting the use of deadly force to prevent the escape of a fleeing felon.
13 The Court held that it was unreasonable under the Fourth Amendment for an officer to
14 “seize an unarmed, nondangerous suspect by shooting him dead,” but that “[w]here the
15 officer has probable cause to believe that the suspect poses a threat of serious physical
16 harm, either to the officer or to others, it is not constitutionally unreasonable to prevent
17 escape by using deadly force.” Garner, 471 U.S. at 11.

18 Moreover, “if the suspect threatens the officer with a weapon or there is probable
19 cause to believe that he has committed a crime involving the infliction or threatened
20 infliction of serious physical harm, deadly force may be used if necessary to prevent
21 escape, and, where feasible, some warning has been given.” Id. at 11-12. The question in
22 Garner was

23 whether, to justify the use of deadly force, an officer must believe only that a
24 suspect is fleeing or also that the suspect represents a serious and immediate
25 threat to the officer or others. In either case, the Court assumed that the
26 belief would have to be reasonable, an inquiry that under the Fourth
27 Amendment always depends upon objective factors and not upon sincerity of
28 belief.

Price v. Sery, 513 F.3d 962, 967 (9th Cir. 2008).

In Graham, the Court considered whether excessive force claims should be

1 analyzed as substantive due process claims or as Fourth Amendment claims. The Court
2 clarified that the reasonableness inquiry turned upon the circumstances confronting the
3 officer, rather than on the officer's subjective belief or intentions. "[T]he question is whether
4 the officer's actions are 'objectively reasonable' in light of the facts and circumstances
5 confronting them, without regard for their underlying intent or motivation." Graham, 490
6 U.S. at 397.

7 Determining whether the force used in a particular seizure was objectively
8 reasonable "requires a careful balancing of the nature and quality of the intrusion on the
9 individual's Fourth Amendment interests against the countervailing governmental interests
10 at stake." Id. at 396. This balancing test involves a consideration of the totality of the facts
11 and circumstances in the particular case, including "the severity of the crime at issue,
12 whether the suspect poses an immediate threat to the safety of the officers or others, and
13 whether he is actively resisting arrest or attempting to evade arrest by flight." Id. In
14 general, the reasonableness of an officer's belief as to the appropriate level of force should
15 be judged from an "on scene" perspective. Id.

16 Here, defendants argue that under the totality of the circumstances, Deputy Patzer's
17 use of deadly force was reasonable under the Graham balancing test. First, they assert,
18 Deputy Patzer viewed Day as a felony suspect. They note that based on the objective
19 evidence of the Mustang's condition (the punched trunk lock, the lack of a key in the
20 ignition, and Day's statement that he could not turn the ignition off), both deputies believed
21 that they were pursuing an individual involved in a stolen vehicle crime. In addition, they
22 assert, Day's reckless driving may have risen to a felony offence, and once he punched
23 Deputy Patzer, Day had clearly committed felony battery of a police officer.

24 Second, defendants contend, Day clearly posed an immediate threat to the safety of
25 Deputy Patzer. They assert that there is no dispute that Day fled from the deputies on foot
26 after being initially detained. They note that Deputy Patzer testified that after he caught up
27 to Day, Day responded by aggressively punching him in the head, dazing him, and that Day
28 continued to punch and take swings at him. They assert that some of those punches made

1 contact, while others were deflected by Deputy Patzer's defensive maneuvers.
2 Defendants also note Deputy Patzer's statements that he did not know whether Day was
3 carrying a weapon when he fled, or whether he might have obtained one during his flight;
4 that because the yard was in total darkness, he could not see Day's hands or waistband,
5 but only his silhouette; and that although he tried several times to push Day away, Day
6 continued his aggressive attacks. Defendants contend that when Day pushed Deputy
7 Patzer into the air conditioner unit, Deputy Patzer reasonably believed there was another
8 aggressor in the yard.

9 Defendants assert that it was only after Day was hovering over and prevailing over
10 Deputy Patzer for the third time that Deputy Patzer fired his weapon. They note that he
11 shot once, and only for the purpose of defending himself from serious bodily injury.
12 Defendants argue that because Day had such a high level of methamphetamine in his
13 system, there was a strong likelihood that he would have overpowered Deputy Patzer to
14 the point of seriously injuring or killing him. Defendants assert that under the
15 circumstances (close contact with and attacks by Day, and the total darkness of the yard
16 area), Deputy Patzer had no ability to use other force options. He feared for his life, and
17 fired his weapon (in a retained position) to attempt to ward off the assault by Day.

18 Third, defendants argue, Day was at all times attempting to evade arrest – initially by
19 fleeing over the fence and around the adjoining house, and then by physically attacking
20 Deputy Patzer. They note that although Deputy Patzer warned Day to stop running, and to
21 stop resisting, the attacks did not stop until Deputy Patzer fired his weapon.

22 Defendants contend in addition that even if the court finds that there is a triable issue
23 as to whether Deputy Patzer violated Day's Fourth Amendment rights, the court should still
24 find that he is entitled to qualified immunity because it was not clearly established that it is
25 unlawful for an officer to shoot a violently aggressive resistive person, who is winning in a
26 hand-to-hand struggle with that officer. Defendants argue that plaintiff can point to no case
27 in which a court has ruled that an officer cannot use deadly force when being attacked and
28 threatened by a suspect in a dark and confined space. In addition, they assert that it is not

1 clearly established that shooting at a repeatedly attacking felony suspect, who is winning
2 the fight with the officer, who may be armed, and who may not be the lone aggressor, is a
3 Fourth Amendment violation.

4 Moreover, defendants contend, even if plaintiff could show that the law was clearly
5 established that Deputy Patzer's actions were unconstitutional, a reasonable officer in
6 Deputy Patzer's situation could have believed that his use of deadly force to stop Day was
7 lawful. They assert that even if Deputy Patzer were mistaken regarding the legality of his
8 actions, his mistake was reasonable given the rapid and uncertain course of events. At a
9 minimum, defendants contend, Deputy Patzer's conduct fell within the "hazy border
10 between excessive and acceptable force," Saucier, at 206, entitling him to qualified
11 immunity.

12 In opposition, plaintiff argues that Deputy Patzer is not entitled to qualified immunity
13 because substantial evidence exists that his use of deadly force was not objectively
14 reasonable. Plaintiff asserts that Day was unarmed, and that while it is true that he fled
15 from a vehicle that may have been stolen, the vehicle's status had not been confirmed.
16 Plaintiff argues further that while Deputy Patzer claims that Day had punched him in the
17 head and assaulted him three times before he fired his weapon, the photographs of Deputy
18 Patzer taken after the incident and supplied by defendants show no serious injuries, just a
19 few scratches.

20 Plaintiff claims that the precise event that precipitated the shooting was Deputy
21 Patzer's collision with the air conditioner, which he mistook for an attack by one of Day's
22 confederates. Plaintiff argues that sincerely held but unreasonable belief does not justify
23 the use of force under Garner, Graham, or Ninth Circuit precedent. Plaintiff contends that a
24 simple statement by an officer that he feared for his safety or the safety of others is not
25 sufficient to justify the use of force, in the absence of objective factors. Plaintiff claims that
26 Deputy Patzer committed a constitutional violation by shooting Day when he was under no
27 threat of physical harm or death.

28 Plaintiff also asserts that given the factual conflicts and the competing inferences in

1 the record, the court may not find as a matter of law that no constitutional violation
2 occurred. In opposing defendants' motion, plaintiff relies heavily on a declaration by Roger
3 Clark, his "police procedures" expert.

4 Among other things, Mr. Clark opines that "Deputy Patzer's use of deadly force was
5 objectively unreasonable even if Deputy Patzer's recollection of events is entirely accurate."
6 He describes the decision to chase Day as a "Fatal Error," which he defines as "a
7 deliberate reckless and dangerous action by a police officer or deputy sheriff which place[s]
8 both the officer and civilians at grave risk of unnecessary harm or death." He contends that
9 this decision was "particularly reckless given the Deputies' failure to confirm by computer
10 that the Ford Mustang had been stolen and the absence of information that Day, if not
11 apprehended, posed a risk of serious physical harm to anyone."

12 Plaintiff claims that the record raises numerous questions that must be answered
13 before any determination can be made as to the reasonableness of Deputy Patzer's
14 actions. First, plaintiff asserts that Deputy Patzer's physical and mental condition might
15 have been a factor in his use of deadly force, because it might have caused him to believe
16 he was under a threat of severe harm when he was not. Plaintiff notes that Deputy Patzer
17 states in his declaration he was exhausted by the struggle, and that he testified in his
18 deposition that he had worked a double shift that day.

19 Second, plaintiff questions whether Deputy Patzer suffered any serious physical
20 harm at the hands of Day prior to the shooting. Plaintiff asserts that the photographs of
21 Deputy Patzer and his clothing show abrasions on his knee, could easily have been caused
22 by the fall through the fence; scratches on the hand, which may well have occurred when
23 he ran through the bushes in pursuit of Day or when he pushed his hand through the rubble
24 in the yard as he tried to get up; and abrasions on his back, which might have resulted from
25 his backing into the air conditioner.

26 Third, plaintiff claims that the bump on the head "likely occurred" when Deputy
27 Patzer struck his head on the air conditioner when he rose to his feet after falling over the
28 fence. Plaintiff points to the August 16, 2006, interview conducted by a Detective A.

1 Deplitch, in which Deputy Patzer allegedly told Sgt. Gary Clark at the scene that he had hit
2 his head on the air conditioner. Plaintiff suggests that the fact that Deputy Patzer stated in
3 an interview taken the following day that he wasn't sure what he hit his head on, but
4 believed that Day had hit him (based on the fact that when he tried to grab Day, Day was
5 facing him) raises disputed issues that preclude summary judgment.

6 In support of the argument that Patzer likely hit his head on the air-conditioner,
7 plaintiff also provides declarations from Henry Martin and his wife Sonja Martin, who live in
8 a house located at 37 Dolphin Drive, which backs up against the property at 26 Galleon
9 Way, where the incident occurred.

10 Henry Martin states that he was sleeping, and at 1:56 a.m. his wife (watching TV in
11 bed) woke him to tell him "something strange was going on outside." Henry Martin heard
12 what the thought were two shots, and looked out the window. He claims to have seen two
13 male figures in the back yard of 26 Galleon Way – one man was "doubled over on the
14 ground," and the second, a sheriff's deputy, "standing approximately 5 to 6 feet away from
15 the other male holding a gun in one hand and a flashlight in the other." He claims that
16 "[t]he deputy ordered the other man to lie on the ground and then pushed him down," and
17 that "[t]he man toppled over onto his side."

18 Sonja Martin states that she heard noises at 1:56 a.m. coming from outside the
19 house in the direction of 26 Galleon Way. She says that at first, she thought she heard two
20 shots. She then woke her husband. As soon as he was awake, she thought she heard two
21 more shots.

22 On the evening of the following day, Henry and Sonja Martin went over to investigate
23 the scene of the shooting. Henry Martin says that he noticed that the side entry gate, which
24 normally opened outward, had been forced open inward and that it was broken off its
25 hinges. He also noticed that there was an air-conditioning unit protruding from the wall
26 adjacent to the gate. Based on his inspection, and what he had heard at the time of the
27 shooting, he "came to believe that the original banging sound" that he had heard "was in
28 fact the breaking of the gate and/or someone or something running into the gate and the air

1 conditioner almost simultaneously.” He believes that the final loud bang he heard was the
2 gunshot.

3 Sonja Martin says she observed that the side yard gate had been broken off its
4 hinges, and that an air-conditioning unit protruded from the wall adjacent to the gate and
5 fence. After discussing the incident with her husband, she decided that the noises she
6 heard were “those of the gate breaking down and possibility [sic] someone running into the
7 air-conditioning unit.” She believes that “the last loud bang” she heard was a gunshot. She
8 claims not to have heard any voices prior to the shooting, but did hear someone yell “Get
9 down!” after what she believes was the gunshot.

10 Fourth, plaintiff asserts that it is far from clear that Day landed anything except
11 “glancing blows” or inflicted any serious harm, and also questions whether Day was
12 prevailing in the struggle, Officer Patzer’s testimony notwithstanding. Plaintiff notes that
13 Day and Officer Patzer were the same height and approximately the same weight. He
14 claims that Deputy Patzer sustained no physical harm from Day, and asserts that a
15 comparison between the medical examiner’s description of Day and the photographs of
16 Patzer fail to show that Day had gained the upper hand. He also notes that Dr. Patterson
17 stated that the bullet took a downward trajectory, and contends that a rational jury could
18 determine that Patzer was actually standing over Day when he fired.

19 Fifth, plaintiff contends that while defendants claim that Deputy Patzer gave Day
20 several opportunities to flee, no evidence exists that he actually verbally communicated that
21 intent. Plaintiff contends that the fact that Patzer pushed Day back does not necessarily
22 mean that he gave Day a signal that he was free to leave. Plaintiff also asserts that when
23 Patzer shot Day, Patzer was standing near the air conditioner and Day was coming south,
24 toward the gate they had previously fallen through. Thus, according to plaintiff, Patzer was
25 between Day and the gate. Plaintiff asserts that a jury could reasonably conclude that Day
26 was attempting to flee from the dark, rubble-strewn yard, but was blocked by Patzer.

27 Sixth, plaintiff questions whether Deputy Patzer could have resorted to other, non-
28 lethal, means of self-defense. He asserts that while Deputy Patzer was armed with a baton

1 and pepper spray, he didn't consider using them, and also notes that there is no evidence
2 that Day attempted to grab Deputy Patzer's weapon. He contends that only a jury can
3 decide whether Deputy Patzer could reasonably have used other means of force.

4 Finally, he questions whether Deputy Patzer had sufficient knowledge of any crime
5 plaintiff might have committed to have considered him a serious threat. Plaintiff contends
6 that, at most, Deputy Patzer knew that Day might be a car thief, but had received no
7 confirmation of that suspicion, and argues that Day was unarmed and that Deputy Patzer
8 could not have known that Day had ingested methamphetamine.

9 The court finds that summary judgment must be GRANTED as to qualified immunity.
10 The objective evidence shows that Deputy Patzer's concern for his personal safety justified
11 his use of deadly force, and that Deputy Patzer had probable cause to believe that Day
12 posed "a threat of serious physical harm." See Garner, 471 U.S. at 11. It is undisputed
13 that Deputies Patzer and Vorhauer had reason to suspect that the Mustang was stolen, that
14 the deputies followed the Mustang, that the Mustang pulled into the driveway of the house
15 at 30 Galleon Way, and that Deputy Vorhauer told Day to exit the vehicle. It is undisputed
16 that Day ran off, and that Deputy Patzer pursued him.

17 It is also undisputed that Deputy Patzer and Day climbed over and/or knocked down
18 a gate in a fence; that they engaged in a scuffle in the darkened side yard of the house at
19 26 Galleon Way; that there was considerable amount of trash and debris in the yard; that
20 Day continued both to resist arrest and to attack Deputy Patzer; that Day was under the
21 influence of a considerable amount of methamphetamine; and that Deputy Patzer suffered
22 scrapes and abrasions on his body and a bump on his head as a result of the incident.

23 What plaintiff disputes is the amount of injury inflicted on Deputy Patzer by Day;
24 whether Day hit Deputy Patzer on the head, or Deputy Patzer hit his head on the air-
25 conditioner; whether Deputy Patzer warned Day that he was about to shoot him; and
26 whether the conditions were such that a reasonable officer would have feared for his life.
27 As to the last question, the court looks at the totality of the circumstances. As to the first
28 three questions, the actual amount of injury inflicted and whether Deputy Patzer was hit by

1 Day or ran into the air-conditioner are minor considerations in the totality of what transpired
2 in the short amount of time that Deputy Patzer pursued Day and he and Day were in the
3 darkness of the side yard.

4 What is significant is that Deputy Patzer had no way of knowing whether Day was
5 armed, or whether one of his friends had escaped from the car. He also could not see Day,
6 except in silhouette, and had no way of knowing whether he was trying to kill him. All he
7 knew is that he was being attacked. The entire incident happened very quickly – the total
8 time from the time the deputies pulled up behind the Mustang until Deputy Patzer shot Day
9 was less than two minutes.

10 Under the circumstances, the fact that Day turned out not to be armed, and the fact
11 that he did not try to grab Deputy Patzer's weapon, do not control whether Deputy Patzer's
12 actions were objectively reasonable. Deputy Patzer was faced with a sudden threat, and
13 had to react quickly. He could not see clearly, and knew only that he was being attacked.
14 He did not shoot Day in the back. Day was shot while facing Deputy Patzer, and while in
15 the process of repeatedly attacking him. Deputy Patzer fired only one shot, just what was
16 necessary to stop the attack on him.

17 Plaintiff has provided no admissible evidence sufficient to create a triable issue. For
18 example, although he speculates that Deputy Patzer's scrapes or injuries may have come
19 from running through the bushes or falling on the debris, as opposed to the violence
20 inflicted by Day, he provides no evidence to support that conjecture. Similarly, while
21 plaintiff speculates that Patzer hit his head on the air-conditioner, the only evidence of that
22 is the declarations of Henry and Sonja Martin, who were not eye-witnesses, who were
23 inside a house across the way with a television on, who are not experts but who
24 nonetheless took it upon themselves to "investigate" the area to decide what had
25 happened, and who formed an opinion as to what "might" have happened based solely on
26 speculation.

27 Plaintiff's attempt to rely on his "police practices" expert Roger Clark to support the
28 general argument that the use of deadly force was objectively unreasonable is also to no

1 avail. The gist of Mr. Clark's opinion is that Deputy Patzer's life was not threatened, that
 2 his fear was imaginary or subjective, and that he acted improperly in giving chase by
 3 himself. While Mr. Clark is arguably qualified as an expert in police practices, the court
 4 gives little weight to his opinions because of their speculative nature. Nor can Mr. Clark's
 5 opinions be used to establish ultimate issues such as whether Deputy Patzer's use of
 6 force was objectively reasonable or whether Deputy Patzer violated Day's constitutional
 7 rights.

8 Even were the court to find some triable issues as to the question whether the use of
 9 deadly force was constitutional, Deputy Patzer would be entitled to qualified immunity
 10 because any mistake regarding the need for deadly force was reasonable under the tense,
 11 uncertain, and swift-moving circumstances with which he was presented. Moreover, the
 12 right to be free from deadly force under the circumstances presented by this case is not
 13 clearly established – that is, a reasonable officer would not necessarily understand that his
 14 conduct was unlawful under the circumstances.

15 Ninth Circuit cases applying this test range from cases finding that deadly force was
 16 not justified, such as Adams v. Speers, 473 F.3d 989, 994 (9th Cir. 2007) (officer shot
 17 unarmed, non-dangerous motorist to prevent his flight but did not warn him to stop and
 18 there was no danger to the shooter or others); to cases finding that deadly force was
 19 justified, such as Billington v. Smith, 292 F.3d 1177, 1185 (9th Cir. 2002) (suspect violently
 20 resisted arrest, physically attacked officer, and grabbed officer's gun). As the cases move
 21 from the no-threat-from-suspect scenario to the significant-threat-from-suspect, there is a
 22 middle ground described in Saucier as the "hazy border between excessive and acceptable
 23 force." Saucier, 533 U.S. at 206 (citation omitted); see also Brosseau, 543 U.S. at 210.
 24 Defendants argue, and the court agrees, that this case falls in that area.

25 2. Whether Deputy Patzer's use of deadly force violated plaintiff's right to
 26 maintain a parental relationship

27 Defendants argue that Deputy Patzer's use of deadly force did not violate plaintiff's
 28 Fourteenth Amendment right to maintain a parental relationship. The Ninth Circuit

1 recognizes that a parent has a constitutionally protected liberty interest under the
2 Fourteenth Amendment in the companionship and society of his or her child. See Porter v.
3 Osborn, ___ F.3d ___, 2008 WL 4614334 at *5 (9th Cir., Oct. 20, 2008); Toguchi v. Chung,
4 391 F.3d 1051, 1060 (9th Cir. 2004).

5 Defendants contend that because plaintiff's second cause of action for loss of the
6 society and companionship of the decedent is predicated and entwined with plaintiff's first
7 cause of action for violation of Day's Fourth Amendment right to be free from excessive
8 force, plaintiff can prevail on his Fourteenth Amendment claim only if there was in fact a
9 violation of Day's constitutional rights. Defendants argue that because Deputy Patzer's
10 actions did not violate Day's Fourth Amendment rights, summary judgment must also be
11 granted as to plaintiff's second cause of action.

12 In opposition, plaintiff argues that the motion for summary judgment on the second
13 cause of action must be denied, because triable issues exist regarding this claim, as
14 plaintiff argued with regard to the first cause of action.

15 The court finds that the motion must be GRANTED. Whether Deputy Patzer
16 committed a constitutional violation under the first step of the qualified immunity analysis
17 presents two issues. First, the court must decide the appropriate standard of culpability to
18 apply to Deputy Patzer's conduct to determine whether it "shocks the conscience" under
19 the Fourteenth Amendment's Due Process Clause. See County of Sacramento v. Lewis,
20 523 U.S. 833, 846 (1998). Second, the court must determine whether Deputy Patzer's
21 conduct met that standard of culpability. See Porter, 2008 WL 4614334 at *5.

22 When a police officer is faced with a set of circumstances evolving over a short time
23 period, necessitating "fast action" and presenting "obligations that tend to tug against each
24 other," the court applies the "purpose to harm" standard in a claim under the due process
25 right of familial association, rather than the "deliberate indifference" standard. Id., 2008 WL
26 4614334 at *7. Here, plaintiff has provided no evidence sufficient to establish that Deputy
27 Patzer acted with a "purpose to harm" Steffan Day. In addition, the court has already
28 determined that Deputy Patzer did not violate Day's constitutional rights.

1 3. Whether plaintiff can demonstrate any Monell-related claims.

2 Defendants contend that plaintiff cannot demonstrate a Monell-related claim, as
3 alleged in his third cause of action. Local governments are “persons” subject to liability
4 under § 1983 when an official policy or custom causes a constitutional tort. Monell v. New
5 York Dep’t of Social Servs., 436 U.S. 658, 690-91 (1978). To prevail on a § 1983 claim
6 against a municipality, a plaintiff must show that he possessed a constitutional right of
7 which he was deprived, that the municipality had a policy, that this policy amounted to
8 deliberate indifference to the plaintiff’s constitutional rights, and that the policy was the
9 moving force behind the constitutional deprivation. Plumeau v. School Dist. No. 40 County
10 of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997).

11 A local government may be liable for constitutional violations resulting from its failure
12 to supervise, monitor, or train, but only where the inadequacy of said supervision,
13 monitoring, or training amounts to deliberate indifference to the rights of the people with
14 whom the local government comes into contact. City of Canton v. Harris, 489 U.S. 378,
15 388 (1989); Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996).

16 Municipal liability based on alleged unconstitutional acts of employees cannot be
17 based on respondeat superior, but rather requires proof that the harm was caused by the
18 policy or custom of the municipality. Monell, 436 U.S. at 694. While the liability of
19 municipalities does not depend on the liability of individual officers, it is contingent on a
20 violation of constitutional rights, which means that in the absence of an underlying
21 constitutional violation, there can be no municipal liability. Scott, 39 F.3d at 916.

22 Here, defendants argue, as Deputy Patzer did not violate Day’s constitutional rights,
23 neither Sheriff Rupf nor the County of Contra Costa can be liable under 42 U.S.C. § 1983.
24 See Forreth v. Richardson, 112 F.3d 416, 421 (9th Cir. 1997) (no Monell liability where
25 individual officers inflicted no constitutional harm); Quintanilla v. City of Downey, 84 F.3d
26 353, 355 (9th Cir. 1996) (same)).

27 In addition, defendants assert, even if plaintiff can demonstrate a constitutional
28 violation, there is no evidence that either the Sheriff or the County had a policy of using

1 excessive and/or deadly force, and no evidence that the County had been involved in a
2 significant number of deadly force shootings prior to this incident. Nor, defendants
3 contend, is there any evidence that the County failed to train Deputy Patzer to the extent
4 that such failure amounts to deliberate indifference to the rights of persons with whom the
5 Sheriff's deputies come into contact. Thus, defendants contend, summary judgment must
6 be granted as to any claims asserted against Sheriff Rupf and the County.

7 In opposition, plaintiff argues that he has viable Monell claims based on the County's
8 "ratification" of Deputy Patzer's unconstitutional conduct, and its "failure to train." Plaintiff
9 claims that there is substantial evidence that could support a finding that Deputy Patzer
10 violated Day's Fourth Amendment right to be free from an unlawful seizure committed by
11 the objectively unreasonable use of deadly force. Plaintiff claims that by exonerating
12 Deputy Patzer, the County "signaled" to its deputies that a policy was in place that
13 permitted the use of deadly force even in the absence of a serious threat of physical harm
14 or death.

15 Plaintiff claims that the excerpts from interviews of Deputy Patzer make clear that he
16 "may well have" sustained the injury to his head by hitting the air conditioner. In addition,
17 plaintiff asserts, when Patzer backed into the air conditioner and mistakenly assumed there
18 was someone behind him, he unreasonably believed he was surrounded and immediately
19 shot Day. Nevertheless, plaintiff contends, despite possessing this information, the County
20 exonerated Deputy Patzer, and may therefore be liable under Monell.

21 Plaintiff contends that the County may also be liable for failure to train. Plaintiff
22 claims that the existence of written policies and a training program does not mean that the
23 training was necessarily adequate. Plaintiff argues that Mr. Clark's declaration establishes
24 that Deputy Patzer acted recklessly in disregarding his training and in pursuing Day without
25 backup. Plaintiff claims that only a jury may decide whether the County had a policy of
26 permitting the unreasonable use of force, and the motion should therefore be denied.

27 The court finds that the motion must be GRANTED. Plaintiff has provided no
28 evidence of any custom or policy of the County that led to the alleged constitutional

violation. In particular, while plaintiff claims that Sheriff Rupf failed to discipline Deputy Patzer for his actions, plaintiff provides no evidence of the County's response to the shooting incident – which, as defendants assert, is an obvious prerequisite for this argument. Moreover, neither Sheriff Rupf nor the County can be liable under § 1983 in the absence of an underlying constitutional violation. Scott, 39 F.3d at 916

4. Whether summary judgment must be granted as to the state law claims

Defendant's final argument is that summary judgment must be granted as to the fourth and fifth causes of action – the state law claims – because Deputy Patzer acted in conformance with the Fourth Amendment. Defendants assert that the claims for wrongful death and civil rights violations must be judged per the "objective reasonableness" standard. Defendants contend that for the reasons stated in the discussion of qualified immunity, above, Deputy Patzer was entitled to use deadly force to protect himself from Day's attacks.

In opposition, plaintiff concedes that the state law claims are governed by the "objective reasonableness" test. Plaintiff asserts, however, that because issues of fact preclude summary judgment of the § 1983 claims, summary judgment may not be granted on the state law claims.

The court finds that the motion must be GRANTED. The "objective reasonableness" standard of Graham applies not only in the Fourth Amendment claim, but also to the state law wrongful death claims. See Edson v. City of Anaheim, 63 Cal. App. 4th 1269, 1273-74 (1998); Martinez v. County of Los Angeles, 47 Cal. App. 4th 334, 343-44 (1996). Because Deputy Patzer acted in conformance with the Fourth Amendment, the state law claims also fail.¹

C. Defendants' Objections and Motion to Strike Evidence

Finally, the court addresses defendants' objections to evidence and motion to strike

¹ The court finds it unnecessary to address defendants' second argument regarding the state law claims – that Deputy Patzer and the County are entitled to immunity under provisions of the California Government Code.

1 plaintiff's evidence. First, defendants object generally to references to the possibility that
2 Deputy Patzer was not hit on the head by Steffan Day, but rather hit his head on the air-
3 conditioner that extended outward from the window into the darkened yard. They also seek
4 an order striking evidence that includes such references. In particular, defendants object to
5 the admission of Exhibits 4, 5, 6, and 7 to the Declaration of Thom Seaton.

6 Defendants assert that Exhibits 4, 5, 6, and 7 are not properly authenticated, as
7 Seaton has no personal knowledge of them, and plaintiff has not laid a proper foundation.
8 Defendants also contend that the evidence is hearsay (or double hearsay) that does not fall
9 within any of the hearsay exceptions in the Federal Rules of Evidence. With regard to
10 Exhibits 4 and 6, defendants also object on the basis that the original tapes have not been
11 provided to the court for evaluation. They assert that the trustworthiness and accuracy of
12 the transcriptions has not been demonstrated or verified by plaintiff.

13 In opposition, plaintiff asserts that Exhibits 4, 5, 6, and 7 were obtained from
14 defendants, and that the evidence is admissible under the hearsay exception for
15 admissions.

16 The question whether Day hit Deputy Patzer in the head as Deputy Patzer rose to
17 his feet after falling through the gate into the yard on the side of 26 Galleon Way, as Deputy
18 Patzer states in his declaration, or whether Deputy Patzer in fact hit his head on the air
19 conditioner, is not determinative of whether Deputy Patzer committed a constitutional
20 violation, for the reasons stated above. Accordingly, as the court has not relied on this
21 evidence in ruling on the motion, the objections are **OVERRULED**.

22 Second, defendants object to the admission of evidence referencing the contention
23 that Deputy Patzer may have suffered injuries from impact with the bushes as he ran
24 alongside the house, or impact with the debris in the side yard. However, the parties have
25 neither produced evidence that Deputy Patzer was injured by something other than the
26 attacks by the decedent, nor evidence that it was only the attacks that caused his scrapes
27 and abrasions. The objection is **OVERRULED**.

28 Third, defendants object to the admission into evidence of the Declaration of Archie

1 Gore and Exhibit 1 thereto. Mr. Gore is a private investigator who was hired by plaintiff's
2 counsel to conduct an investigation into the incident that resulted in the death of Steffen
3 Day. Exhibit 1 to Mr. Gore's declaration is a diagram of the outside area of 26 Galleon
4 Way, which Gore states that he prepared. The declaration contains no other information.

5 Defendants assert that plaintiff has not properly authenticated or laid a foundation for
6 such evidence, as there has been no showing that Gore visited the site of the shooting, or if
7 he did, when such visit occurred, whether the site was in the same condition as it was on
8 the night of the shooting incident, and whether Gore relied on police diagrams in preparing
9 his sketch.

10 Defendants also assert that Gore is improperly offering opinion testimony as a lay
11 witness, in violation of Federal Rule of Evidence 701; and contend that Gore's
12 representations are not rationally based on his perceptions, not helpful to a clear
13 understanding of his testimony or of a fact in issue, and not based on scientific, technical,
14 or other specialized knowledge within the scope of Federal Rule of Evidence 702. They
15 also assert that such evidence is hearsay, as plaintiff is offering the document for the truth
16 of the matter asserted (that the site conditions and measurements are as represented by
17 the hired consultant), and that this hearsay does not fall within any of the hearsay
18 exceptions.

19 In opposition, plaintiff contends that Exhibit 1 to the Gore Declaration is fully
20 consistent with the Criminalistics report prepared by the Sheriff's office and produced by
21 defendants, and is also consistent with the photographs of the yard. He claims that it more
22 than meets the low threshold that a party must meet in order to authenticate a document.

23 The objection is SUSTAINED. The declaration says nothing about when Gore
24 prepared the diagram, under what circumstances, and based on what information. It is
25 irrelevant for purposes of this motion that the diagram is "consistent with" other evidence.

26 Fourth, defendants object to the admission of the declarations of Henry Martin and
27 Sonja Martin, on the basis that this evidence was not disclosed to defendants in discovery,
28 and that in fact, plaintiffs represented in discovery that the "neighbors did not see or hear

1 any fights between Patzer and the decedent.” Defendants claim that plaintiff is now trying
2 to “improperly sandbag” defendants with these “manufactured and speculative
3 declarations.”

4 Defendants also assert that neither Henry nor Sonja Martin is competent to make
5 the representations that they make in their declarations, as they did not witness the
6 shooting incident and therefore lack sufficient personal knowledge. In addition, defendants
7 contend that plaintiff has not laid a proper foundation that either Henry or Sonja Martin
8 knows what it sounds like when someone runs into an air conditioner; that Henry and Sonja
9 Martin are improperly offering lay witness opinions, in violation of Federal Rule of Evidence
10 701; that their testimony does not qualify under Federal Rule of Evidence 702; that the
11 evidence is hearsay that is not admissible under one of the hearsay objections; that the
12 evidence is not properly authenticated; and that the evidence is based on pure speculation
13 and guesswork.

14 In opposition, plaintiff contends that defendants knew about the Martins because the
15 Martins contacted the police to relay their conclusions about the noises they had heard.
16 Thus, he asserts, defendants have known these facts since August 2006. Plaintiff
17 contends that under Federal Rule of Evidence 602, testimony should not be excluded
18 unless no reasonable juror could believe that the witness had the opportunity and the ability
19 to perceive the event he testifies about. Plaintiff argues that the question whether a party
20 has met the burden under Rule 602 is primarily one for the jury to decide. He contends that
21 the Martins’ conclusions following their “inspection” of the site were rational inferences
22 based on the hearing of the sounds following the shooting, and the examination of the
23 scene.

24 The objections are SUSTAINED. The Martins did not witness the shooting incident,
25 and their opinions regarding the source of the noises they may or may not have heard are
26 therefore entirely speculative.

27 Fifth, defendants seek to strike the Declaration of Roger Clark, as well as the
28 exhibits thereto. As an initial matter, defendants assert that Mr. Clark’s testimony should

1 be excluded because plaintiff has not established that Mr. Clark is qualified as an expert in
2 the field of “police procedures.” They claim that he does not have the proper knowledge,
3 skill or experience to qualify as such an expert. The court finds that this objection should
4 be OVERRULED. Mr. Clark’s CV and Rule 26 report establish that he is generally qualified
5 to testify as to police procedures. The court does not find the lack of published books or
6 other materials to be significant.

7 Defendants’ second argument – that many of Mr. Clark’s opinions are inadmissible
8 because they are speculative or improperly based on legal conclusions – is more
9 persuasive. Defendants cite numerous statements, arguing that the cited statements relate
10 to what amounts to guesswork by Mr. Clark about things that could or could not have
11 occurred in relation to the incident, or in relation to the future, all of which are total
12 speculation.

13 For example, defendants assert that Mr. Clark guesses about whether Day posed a
14 future risk of harm to anyone; predicts (without any basis) that the foot pursuit of Day
15 carried with it the strong probability that serious physical harm or death would result to Day;
16 speculates (without any showing of medical training or expertise) that Deputy Patzer did not
17 sustain any serious physical harm, and was not under threat of physical harm or death at
18 the time of the shooting; holds himself out as a sleep-deprivation expert and medical expert
19 when he opines about the effect of loss of sleep on Deputy Patzer, in particular, on the
20 effect on actions that he never witnessed; speculates about the positions of Patzer and
21 Day, and then tries to guess that Day would have had to run in a particular direction in
22 order to flee; speculates about which event “appears” to have precipitated the shooting,
23 even though he was not present, and even though this speculation is contradicted by
24 Patzer’s version of events; and attempts to render medical opinions and to offer opinions
25 about how Patzer’s injuries “likely” occurred.

26 In opposition, plaintiff contends that Mr. Clark’s testimony is based on his experience
27 and the evidence and therefore is not speculative. Plaintiff contends that because Mr.
28 Clark has police experience and has supervised numerous “apprehensions,” he is qualified

1 to state that had Deputy Patzer followed proper police procedure, Day would not have been
2 killed. He argues that because defendants' justification for the use of deadly force was the
3 harm that Patzer sustained, it is not speculative for Mr. Clark to opine that Patzer did not
4 sustain any harm.

5 Plaintiff also asserts that because Patzer testified that he shot Day after backing into
6 the air conditioner, it is not speculative for Mr. Clark to testify that Patzer was acting from a
7 subjective fear, not an objectively reasonable fear of death or serious physical harm. He
8 contends that Mr. Clark has experience supervising other law enforcement officers, and so
9 is not speculating when he comments on the effect of Patzer's alleged lack of sleep. He
10 also argues that as an expert reviewing the totality of the circumstances, Mr. Clark is
11 qualified to rely on the photographs of Deputy Patzer in concluding that he used deadly
12 force in response to a subjective fear and not to objective factors.

13 Plaintiff claims that Mr. Clark's conclusion that Day would have had to run past
14 Deputy Patzer in order to flee through the gate is consistent with evidence in the
15 Criminalistics report produced by defendants, with the photographs of the scene, and with
16 Deputy Patzer's testimony at the administrative review, and is therefore not speculative.
17 Plaintiff contends that this refutes defendants' contention that Deputy Patzer was allowing
18 Day to flee.

19 Plaintiff argues that Mr. Clark's opinion that Deputy Patzer shot Day based on his
20 unsupported belief that he was being attacked by Day's confederates is based on Deputy
21 Patzer's own testimony and must be viewed with the totality of the circumstances.
22 Plaintiff claims that the lack of serious physical harm coupled with Deputy Patzer's
23 "baseless" belief that he had been attacked from behind support Clark's opinion that the
24 shooting was based solely on the deputy's subjective fear.

25 Plaintiff asserts that Mr. Clark's opinion regarding the source of Patzer's injuries is
26 based on the record, not speculation. Plaintiff notes that the evidence shows that Deputy
27 Patzer chased Day through the bushes and over a fence, and that Deputy Patzer fell
28 through the gate and slipped in the trash and debris and put his hand in the debris. In

1 addition, plaintiff claims that the evidence shows that apart from the initial blow to the head,
2 Deputy Patzer suffered only glancing blows because he was able to duck and move.
3 Plaintiff contends that Mr. Clark could also rely on Sgt. Clark's testimony that Deputy Patzer
4 told Sgt. Clark that he had hit his head on the air conditioner.

5 Defendants also assert that Mr. Clark offers numerous opinions regarding liability
6 and/or offers legal conclusions that should be stricken. For example, defendants assert,
7 Mr. Clark claims that Deputy Patzer made a "fatal error" in deciding to pursue Day alone on
8 a night that Patzer had described as "very dark;" that Deputy Patzer's decision to pursue
9 Day can only be viewed as deliberately reckless and dangerous, and an act directly
10 connected to the shooting death of Day; that Deputy Patzer's use of deadly force was
11 completely unjustified and objectively unreasonable; that evidence that Deputy Patzer may
12 have struck his head on the air conditioner makes his use of deadly force even more
13 unreasonable and unsupportable; and that any fear that Deputy Patzer possessed cannot
14 be considered objectively reasonable justifying the use of deadly force.

15 Defendants argue that these statements constitute improper attempts to use expert
16 testimony to establish the ultimate issues in the case, as they are attempts to establish that
17 Patzer violated the legal standard set forth in Graham v. Connor and/or attempts to
18 establish causation. They also note that these statements are particularly surprising given
19 that Mr. Clark testified in his deposition that he was not qualified to offer an opinion as to
20 whether Patzer's actions were constitutional.

21 In opposition, plaintiff asserts that Mr. Clark's opinion that Patzer committed a "fatal
22 error" which was deliberately reckless and directly connected to the shooting of Day does
23 not tell the jury what result to reach. They claim that as an expert on police procedures, Mr.
24 Clark is qualified to present the admissible opinion that Deputy Patzer acted recklessly in
25 pursuing Day. Plaintiff appears to concede that Mr. Clark is not permitted to proffer an
26 opinion regarding whether the shooting was objectively unreasonable. Nevertheless,
27 plaintiff argues that Mr. Clark should be permitted to state that the shooting would not have
28 been justified even if Day had punched Patzer in the head.

1 Plaintiff claims that defendants' arguments run counter to the use of police
2 procedures expert testimony recognized in several cases; and asserts that if he is not
3 permitted to use this testimony, the court will essentially be relying only on the self-serving
4 testimony of Deputy Patzer.

5 Defendants' final argument is that even if Mr. Clark's opinions are accepted, they do
6 not demonstrate the existence of any genuine material factual dispute as to any alleged
7 constitutional violation. They contend that Mr. Clark's opinions amount to testimony that
8 Deputy Patzer used bad or negligent tactics that led directly to the shooting of Day.

9 Thus, defendants argue, Mr. Clark's testimony regarding Deputy Patzer's alleged
10 "fatal error" in following Day by himself away from the patrol car, and Deputy Patzer's
11 alleged error in failing to notify dispatch of the situation or to call in other units before
12 attempting to pursue Day, or to fail to use other, less lethal methods during the struggle,
13 are all irrelevant to the question whether his use of deadly force was objectively
14 reasonable. They contend that such criticisms are essentially based on masked 20/20
15 hindsight, which Graham has held is to be ignored.

16 In opposition, plaintiff argues that Mr. Clark's declaration and report raise "serious
17 issues" about Deputy Patzer's conduct. Mr. Clark notes that Day was 17 years old, that
18 Deputy Patzer had no information that Day had committed any crime, that Deputy Patzer
19 had access to other, non-lethal, enforcement tools but made no attempt to use them, and
20 that Day inflicted no serious harm on Deputy Patzer. Plaintiff claims that these admissible
21 opinions would support a jury's finding that Deputy Patzer's use of deadly force was
22 unreasonable.

23 The objections are largely SUSTAINED. The court agrees with defendants that
24 much of Mr. Clark's opinion is speculative, and goes beyond the scope of his expertise. He
25 is not a medical expert, and so is not qualified to testify as to the seriousness of Deputy
26 Patzer's injuries. He is not a psychiatrist, and is not qualified to testify as to whether
27 Deputy Patzer's fear was rational or not. He was not an eye-witness, so he cannot say
28 what happened during the incident.

Moreover, the testimony regarding legal conclusions is improper. While “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact,” Fed. R. Evid. 704, an expert witness cannot give an opinion as to his legal conclusion – that is, an opinion on an ultimate issue of law. Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1017 (9th Cir. 2004).

Nor does the fact that an expert disagrees with an officer’s actions mean that the officer’s actions were unconstitutional. Billington, 292 F.3d at 1189. A plaintiff cannot avoid summary judgment simply by producing an expert’s report that an officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless. See id. Rather, the court must decide as a matter of law whether the officer’s conduct was objectively reasonable.

In addition, plaintiff cannot establish a Fourth Amendment violation simply by proffering an expert opinion to the effect that Deputy Patzer committed negligent acts or used unwise tactics, as negligent acts do not incur constitutional liability. Id. at 1190. Even if an officer intentionally or recklessly provokes a violent confrontation or response, that does not transform the incident into a constitutional violation unless the provocation was in itself an independent constitutional violation. Id. at 1190-01.

CONCLUSION

In accordance with the foregoing, the court finds that defendants’ motion for summary judgment must be GRANTED.

IT IS SO ORDERED.

Dated: November 10, 2008.



PHYLLIS J. HAMILTON
United States District Judge